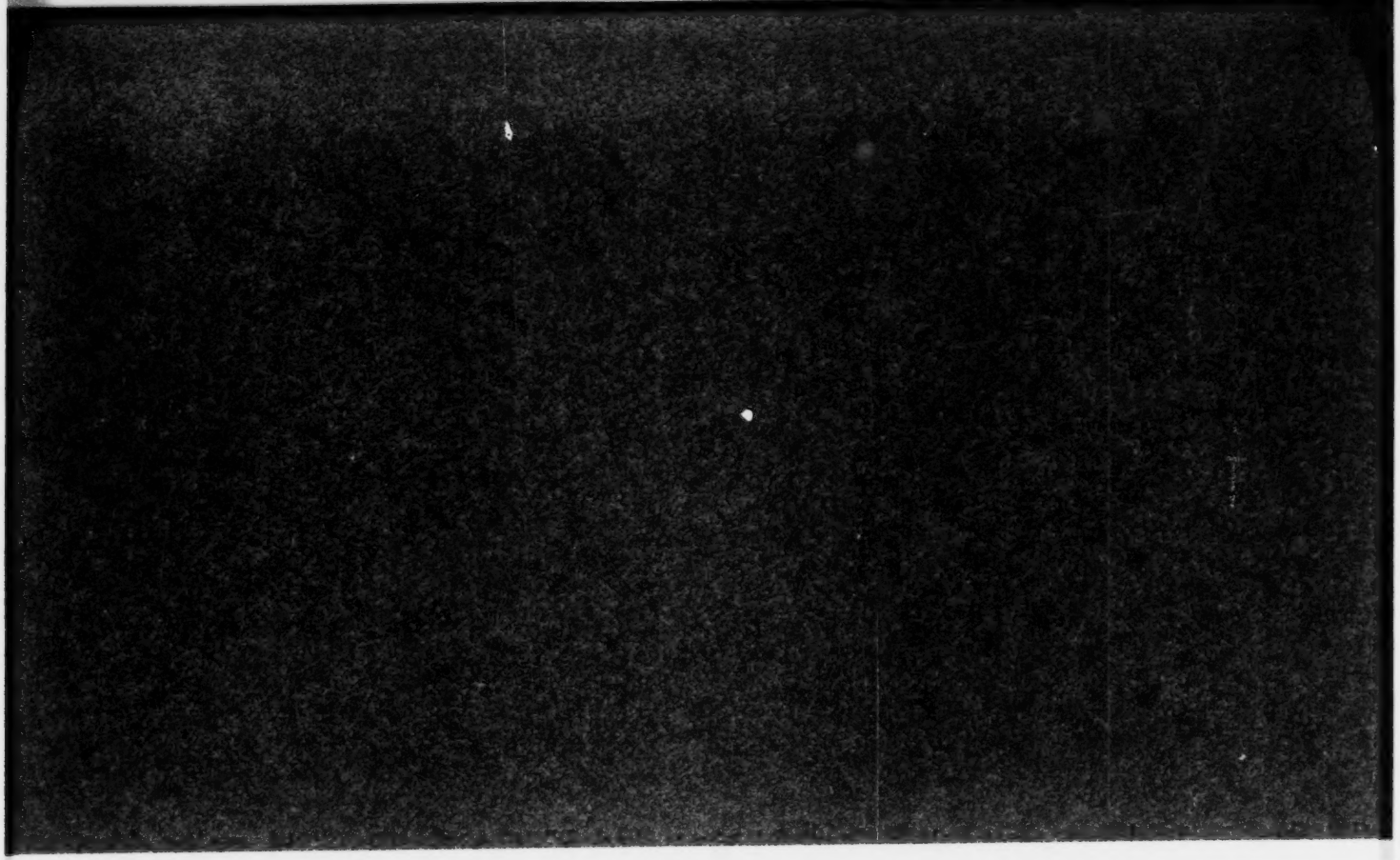

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 310

FRANK O. LOWDEN, JAMES E. GORMAN, AND JOSEPH B. FLEMING, TRUSTEES OF THE ESTATE OF THE CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 53–79) is not reported.

JURISDICTION

The judgment of the Court of Claims sought to be reviewed was entered on May 5, 1941 (R. 81). The petition for a writ of certiorari was filed July 25, 1941. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTIONS PRESENTED

1. Whether a suit brought in the Court of Claims in 1935 to recover alleged overpayments made in 1922 by a purchaser of coal lands from the Choctaw and Chickasaw Nations pursuant to the Act of February 8, 1918, 40 Stat. 433, is barred by the six-year limitation provision of the Tucker Act.

2. Whether petitioners' cause of action, if any, is within the jurisdiction of the Court of Claims, the United States not having been a party to any of the agreements between the purchaser and the Choctaw and Chickasaw Nations and all monies accruing from those agreements having become the property of the Nations and having been deposited in the Treasury to their account.

3. Whether a lessee of Choctaw and Chickasaw coal deposits, who subsequently purchased the leased premises, is entitled to deduct from the purchase price: (a) production royalties paid on coal mined after the deposits were auctioned under the 1918 Act but before the sale was approved by the Secretary of the Interior; (b) unused advance royalties paid on developed leases; and (c) more than one-half of unused advance royalties paid on undeveloped leases.

STATUTE AND REGULATIONS INVOLVED

The provisions of the Act of February 8, 1918, 40 Stat. 433, are printed in the Appendix, *infra*, pp. 12–16. Pertinent portions of the regulations

promulgated by the Secretary of the Interior under the Act may be found at R. 57–60.

STATEMENT

Petitioners, as trustees of the Choctaw, Oklahoma & Gulf Railroad, sought recovery in the Court of Claims for three items which the Railroad had not been permitted to deduct from its bid price on twenty-one tracts of coal lands purchased from the Choctaw and Chickasaw Nations pursuant to the Act of February 8, 1918, 40 Stat. 433. The relevant facts as found by the Court of Claims (R. 53–73) may be summarized as follows:

In 1899 the Choctaw, Oklahoma & Gulf Railroad leased from the mining trustees of the Choctaw and Chickasaw Nations, for a period of 30 years, 15 developed and 4 undeveloped tracts of coal deposits owned in fee by those tribes, the Railroad agreeing to pay prescribed annual advance royalties against which it was to be permitted to set off production royalties due on coal actually mined (R. 3–4).

In February 1918, Congress authorized the sale of these coal deposits at public auction (subject to the rights of existing lessees), the purchaser to pay 20% cash and the balance in four equal installments. The Act laid down numerous other conditions and authorized the Secretary to prescribe additional terms and conditions not inconsistent with the Act itself (R. 55–57). Detailed regulations for the auction of the coal deposits were pro-

mulgated by the Secretary on September 24, 1918 (R. 57–60). When the auction was held at McAlester, Oklahoma, on December 11, 1918, the Railroad submitted bids covering its 19 leased tracts, as well as 2 other tracts of which it was not the lessee (R. 61). These bids were approved by the Assistant Secretary of the Interior on August 29, 1919 (R. 62).

As the several installments of the purchase price fell due, the Railroad contended that it was entitled to deduct from the purchase price certain royalties which it had theretofore paid as lessee (R. 63–65). Three requested deductions refused by the United States form the subject matter of the present suit.

The first deduction claimed, amounting to $20,112.39, is based upon the following facts: Between the time its bids were submitted on December 11, 1918, and approved on August 29, 1919, the Railroad continued its mining operations under the 1899 leases and paid production royalties amounting to $35,193.14 (R. 62). The Railroad contended that the Secretary's approval of the sale related back to the date the bids were submitted, and that the Railroad should have been permitted to deduct production royalties paid after that date (R. 63). The Secretary, on the other hand, contended that the sale date was August 29, 1919, when the bids were approved, that the Railroad held as lessee until that date, and that the Indians were entitled to

retain royalties paid on coal mined during this interval (R. 66).[1]

The second deduction claimed, amounting to $20,078.96, is based on these facts: The Railroad, between the time it entered into the leases in 1899 and the time when it submitted its bids, December 11, 1918, paid $125,924.64 advance royalties on developed tracts (R. 54). Production royalties on coal mined by the Railroad during the same period amounted to only $105,845.68, leaving a balance of $20,078.96 in advance royalties standing to the Railroad's credit on December 11, 1918 (R. 54–55). The Railroad contended that it should have been permitted to deduct this sum from the bid price (R. 64–65). The Secretary contended that the statute permitted no such deduction (R. 69).

The claim for the third deduction, amounting to $7,739.75, is based on the contention that the Railroad should have been permitted to deduct from the purchase price all advance royalties ($34,400) paid on undeveloped tracts prior to

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[1] The Department of the Interior has consistently held that interest on unpaid installments should begin to run from the date the bids were approved, and has refused to accept interest tendered for the period which elapsed between the date the bids were submitted and the date they were approved (R. 63). The Railroad recognizes that if its theory of the sale date is accepted, interest should be computed from the earlier date, and accordingly deducts the interest for this interval ($15,080.75) from its claim for production royalties ($35,193.14), leaving a balance of $20,112.39, the amount sued for as item 1 (Pet. 6).

December 11, 1918 (cf. Pet. 6). The Secretary contended that under the 1918 statute the Railroad was entitled to deduct one-half of these royalties and no more; that $17,200.00 had accordingly been allowed when the second installment was paid (R. 62); that an additional $9,460.25 had been inadvertently allowed when the third installment was paid (R. 63); and that the claim for the balance, $7,739.75, was without merit (R. 72).

Upon rejection of these claimed deductions by the departmental officials, the Railroad made its final payment under protest in 1922 (R. 64), receiving its patent from the Indian tribes in 1924 (R. 63–65). In 1927, the Railroad asked that its claims be reconsidered; this was done and the claims were again rejected (R. 68–69). The Railroad persisted and the claims were rejected for a second time in 1928 and again for a third time in 1932 (R. 69, 72). Finally in 1935, after an unsuccessful suit in Oklahoma and the dismissal of a pending suit in the District of Columbia, petitioners instituted the present action in the Court of Claims to recover the alleged overpayments (R. 1).

The Government contended that the Court of Claims was without jurisdiction for two reasons: (1) Because the claims were based on leases and sales which the Railroad had entered into with the Choctaws and Chickasaws, and not on contracts with the United States; and (2) because in any event the claims were not brought within the statu-

tory period prescribed by Congress. Although these pleas were overruled in 1936, the Court, in dismissing the petition and denying recovery on the merits in 1941, expressly stated that it was not deciding whether the defendant was properly subject to suit and whether the statute of limitations had run (R. 79).

ARGUMENT

The judgment of the Court of Claims dismissing the petition and denying recovery is not in conflict with any decision of this Court or of any circuit court of appeals and presents no question of importance. Furthermore, that judgment is plainly correct for each of three reasons:

1. The Choctaw and Chickasaw Nations were the owners in fee of the mineral lands which the Railroad originally leased and subsequently purchased (R. 74). Although these lands were disposed of pursuant to legislation passed by Congress in the exercise of its plenary power over tribal affairs, the United States itself was not a party to the lease and sale agreements, the final patents being issued by the tribal chiefs (R. 53, 65). Even more important, all monies accruing from these transactions became the property of the Choctaws and Chickasaws and were deposited in the Treasury to their credit (R. 54, 57). The decision in *United States* v. *Algoma Lumber Co.*, 305 U. S. 415, 420–422, makes clear that a suit to recover from the United States claims arising out of such

contracts is not within the jurisdiction of the Court of Claims. It therefore follows that the petition was rightly dismissed.

2. Furthermore, whatever cause of action the Railroad may have had, accrued not later than the date of the final payment on December 11, 1922 (R. 64–65). On that date, if not before, the Railroad had the election of paying the amount demanded or of paying the amount it deemed proper and suing to compel a delivery of the patent. The Railroad chose to pay under protest. The present action was not filed until thirteen years later (R. 1), long after the expiration of the six-year period allowed by the Tucker Act. Judicial Code, sec. 156, 28 U. S. C. § 262. The limitation provision being jurisdictional (*Finn* v. *United States*, 123 U. S. 227, 232), the running of the period is not tolled while the claimant seeks to have his claim allowed by an administrative officer, except in those instances where Congress has specified that the claim be first submitted to and rejected by a particular official. *Withers* v. *United States*, 69 C. Cls. 584, 587. Even assuming there to have been such a requirement in this case, it is to be noted that the claims were formally disallowed on November 17, 1927, and again on October 13, 1928 (R. 69), more than six years before this suit was instituted (R. 1). The cause of action was not revived by the Railroad's request in 1932 to have the claims administratively reexamined for a third

time (R. 72). The claims not having been brought within six years after they first accrued, the petition was properly dismissed.

3. Finally, the claims themselves are without merit.

Item 1: The Secretary correctly refused to permit the Railroad to deduct production royalties paid during the interval which elapsed between the date the bids were submitted and the date they were approved. As the court below pointed out (R. 75), the statute itself sheds little light on the problem. The regulations on the other hand are quite significant. Section 13 expressly states that all royalties paid subsequent to the date of approval of the sale should belong to the purchaser (R. 59), thereby implying that royalties paid prior to that date should be retained for the benefit of the Indians. Section 16 likewise declares that after the approval of its bid the purchaser should be furnished a certificate entitling it to possession (R. 60), thus indicating that prior to that date the Railroad was in possession as lessee. These regulations were in force when the bids were submitted and are binding on the Railroad (R. 57). They furnish strong support for the Secretary's contemporaneous ruling that the sale was effective from the date of approval and not before.

It may be noted that when the identical problem was submitted to Attorney General Mitchell in 1931, he too concluded that the purchaser was not

entitled to recover royalties paid on coal mined prior to the date the sales were approved by the Secretary of the Interior. 36 Op. A. G. 473 (1931). Although a contrary conclusion was reached by the Solicitor of the Interior Department in 1924 and by an Oklahoma federal district court in 1935 (Pet. 17–18), there is no conflict of a nature to justify the issuance of a writ of certiorari, particularly since the 1918 statute has been fully executed, no other suits are pending, and any further claims for the recovery of interim royalties are barred by the statute of limitations.

Items 2 and 3: The 1918 Act expressly provides that where a lessee becomes the purchaser of coal deposits on undeveloped leases owned by him, one-half of the advance royalties paid on such leases shall be credited to the purchase price. This explicit provision for the crediting of one-half of the advance royalties paid on undeveloped leases and the omission of a comparable provision with respect to developed leases seems plainly to indicate that Congress did not intend that the purchaser should be allowed to deduct the unused advance royalties standing to its credit on developed leases. 35 Op. A. G. 259, 262 (1927). And since the Railroad has already been allowed to deduct one-half of the royalties paid on undeveloped leases, it has received all the deductions it is entitled to with respect to such leases. 35 Op. A. G. 259, 262 (1927). As the court below pointed out (R. 78–79), the committee

hearings and debates on the bill which became the Act of February 8, 1918, make clear that no credits, other than those which the Railroad has already received, were to be allowed the purchaser of leased deposits acquired under that Act (R. 78).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1941.